

MAINE DEPARTMENT OF LABOR
Bureau of Unemployment Compensation

DETERMINING WHETHER OR NOT A WORKER'S SERVICES ARE EMPLOYMENT
(Commonly referred to as the "ABC Test")

This explains how the Maine Department of Labor, Bureau of Unemployment Compensation determines whether or not a worker's services are employment. For purposes of Unemployment Insurance coverage, Maine Employment Security Law defines employment as "...any service performed for wages or under any contract of hire, written or oral, expressed or implied." The definition contains the following three-part test [Title 26, Section 1043,11,E,(1)(2)(3)], which provides that service performed by an individual for wages shall be deemed employment unless and until it is shown to the satisfaction of the Bureau of Unemployment Compensation that:

1. The individual performing the service has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact; and
2. The service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the enterprise for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business.

The employer has the burden of meeting **all three parts** of this provision of the Law, commonly known as the "ABC Test," in order to exclude a worker's services from employment. It is not sufficient to meet only one or two parts of the "ABC Test." If the employing unit fails to meet one section of the "ABC Test," it is not necessary to consider the other sections.

Part A. CONTROL OR DIRECTION

This part of the "ABC Test" requires the employer to show proof it does not, nor does it have the right to, control or direct the worker. Some examples of control are when the employer sets prices and wages, sets work performance standards, determines the terms of employment contracts, provides a place for the worker to perform the services, reserves the right to instruct, discipline or discharge workers, exercises control over price of products, or furnishes leads. See *Hasco Manufacturing Company v. Maine Employment Security Commission*, **185A.2d (Me. 1962)**.

Part B. USUAL COURSE OF BUSINESS / PLACES OF BUSINESS

This part of the "ABC Test" contains two provisions, which address the employer's usual course of business and its places of business. The employer needs only to meet one of these two provisions.

Of the two, the second provision is frequently the more difficult to meet. The Maine Department of Labor interprets "place of business" to mean any place where the employer operates or conducts its business. This is not limited to its office, shop or plant, but includes the business territory within which the employer operates. (See *Gerber Dental Center Corporation v. Maine Unemployment Insurance Commission*, 531, A.2d, 1262 (Me. 1987); *Bargain Busters, Inc. v. Vermont Employment Security Board*, 287, A.2d, 554, (Vt. 1972); and *Hasco*).

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Part C. INDEPENDENTLY ESTABLISHED BUSINESS

This part of the “ABC Test” requires proof that the worker has an independently established trade, occupation, profession or business. The Maine Department of Labor interprets that to mean the worker’s business stands along, independent of services performed on a particular job. Such a worker must make it known to potential customers that he or she is available to perform service and that his or her business is established to the extent that it can operate without hinderance from any source. Another indicator of an established business is shown when the worker can experience either a profit or a loss from the business operations. The services performed must be in connection with the independently established business to pass this part of the “ABC Test.” For example, a person in business as a carpenter would be an employee when performing services other than carpentry. (See Samuel Nyer d/b/a Youngstown Home Improvement v. Maine Unemployment Insurance Commission, 601 a.2d, 626 (Me. 1992); Hasco; and Gerber).

Neither a written agreement nor the intent of the parties will necessarily determine the nature of the relationship for purposes of Law. **(An individual could intentionally enter into an independent contractor agreement with an employer and still perform services determined to be in employment under the Maine Employment Security Law).**

The issue of whether a worker is an employee or an independent contractor is a complex one. Employers are encouraged to contact the Department of Labor, Status Unit, at the above address or by telephone at (207) 287-3176. Once all details of the working relationship are considered, the Bureau of Unemployment Compensation will render a decision, which may be appealed.

Failure to report wages or pay taxes on earnings of workers based on an assumption that they are independent contractors may result in the assessment of additional taxes, penalties and interest if the services are later determined to be employment.

<http://www.Maine.gov/labor/uitax/uctax.html>

QUESTIONS ABOUT THIS NOTICE?

Contact a Status Representative at (207) 287-3176; Fax: (207) 287-3733;
TTY (Deaf / Hard of Hearing): 1-800-794-1110, E-mail: **division.uctax@Maine.gov**